

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK
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5 - - - - - X
6 UNITED STATES OF AMERICA) 15CR142
7 vs.)
8 GREGORY WILLSON, ET AL.) Buffalo, New York
9 Defendant.) March 17, 2017
10 - - - - - X 1:15 p.m.

11 **MOTION ARGUMENT**
12 **Transcribed from an Electronic Recording Device**

13 TRANSCRIPT OF PROCEEDINGS
14 BEFORE THE HONORABLE MICHAEL J. ROEMER
15 UNITED STATES MAGISTRATE JUDGE

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6 P R O C E E D I N G S

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10 THE CLERK: Case No. 15CR142, United States versus
11 Pirk. Parties, counsel, please state your name and the party
12 you represent for the record.

13 MR. TRIPI: Joseph Tripi and Brendan Cullinane for
14 the United States. Good morning, your Honor.

15 MAGISTRATE JUDGE ROEMER: Good morning.

16 MR. HOOVER: Hodgson Russ, Tim Hoover, Pat
17 Fitzsimmons and Reeta Dutta for Tom Scanlon, who is present.

18 MR. CONNORS: Terry Connors and Jim Grable for Mr.
19 Enix.

20 MR. PIERI: John Pieri for Filip Caruso.

21 MR. MOLLOY: John Molloy on behalf of Jack Wood,
22 he is not present. He is aware.

23 MR. STACHOWSKI: Michael Stachowski for Stanley
24 Olejniczak. He is here.

25 MR. COVERT: Barry Covert and Mike Deal for Andre

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2 Jenkins. I don't think he accepted transportation, either.

3 MR. EASTON: William Easton and Cheryl Meyers Buth
4 appearing for David Pirk.

5 MR. MAHONEY: Mark Mahoney for Sean McIndoo,
6 Judge.

7 THE COURT: Good morning, counsel. Happy St.
8 Patrick's Day for all of those who are believers. Mr. Molloy,
9 you don't have a lick of green on.

10 MR. MOLLOY: I don't need it.

11 MR. STACHOWSKI: Again, neither does Mr. Mahoney.
12 Mr. Molloy was going to wear orange.

13 MAGISTRATE JUDGE ROEMER: We'll start with Mr.
14 Covert and get a scheduling order in place for your motions and
15 a hearing date for your hearings.

16 MR. COVERT: Yes, your Honor.

17 MAGISTRATE JUDGE ROEMER: Government, about how
18 much time?

19 MR. TRIPI: Judge, the motions that are being
20 handled by Judge Wolford, we have a date to respond by April
21 3rd. I think that date would suffice for the portion of the
22 motions that are before this Court as well. So, I would
23 suggest April 3rd for the government's response.

24 MR. COVERT: Actually, I think we set it for April
25 7th.

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2 MR. TRIPI: You're right, April 7th, Judge.

3 MR. COVERT: Our response is due on the 28th.

4 THE COURT: Mr. Tripi, I suppose you will be
5 opposing the hearing on the motions?

6 MR. TRIPI: Yes, Judge. I haven't fully,
7 obviously, fully briefed the issues yet, but I am anticipating
8 opposing and I'll make my arguments in writing.

9 THE COURT: Let's go ahead and set a date for the
10 hearing in the outside chance that I deny your request and we
11 have a motion anyway, or a hearing anyways.

12 MR. TRIPI: Judge, briefly, in this one, as I
13 understand the hearing as it relates to identification
14 procedures.

15 MR. COVERT: And suppression.

16 MAGISTRATE JUDGE ROEMER: I think this is a
17 suppression of a gun that was seized.

18 MR. COVERT: A gun that was seized in Darien,
19 Tennessee or Georgia.

20 MR. TRIPI: There was a car stopped in Georgia as
21 well. That would involve some coordination. I don't know the
22 availability of that Georgia state trooper as I sit here today.
23 But the other issues related to the identification procedures,
24 a lot of that will be duplicative of hearings that were had in
25 state court, so I may be submitting transcripts for the Court

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2 to review in connection with our motion responses. So given
3 all of that and the fact the Court may be conducting some
4 transcript review in connection with our response, I suggest
5 that you maybe set it a little further down the road than you
6 normally would have if there weren't those issues.

7 MAGISTRATE JUDGE ROEMER: Mr. Covert?

8 MR. COVERT: That's fine.

9 MAGISTRATE JUDGE ROEMER: How would Wednesday, May
10 24th and Thursday May 25th be?

11 MR. TRIPI: That would work, your Honor. If for
12 some reason, I don't anticipate a problem, but for if some
13 reason the out-of-state witness would be unavailable, I'll
14 promptly advise the Court to work on alternative dates.

15 MR. COVERT: We have no problem with those dates,
16 and if Mr. Tripi has a need to move them, we'll coordinate with
17 him.

18 MAGISTRATE JUDGE ROEMER: We'll start each of
19 those dates at 9:30. And then I think what we'll do in your
20 particular situation, we'll just do all of the motions that I'm
21 going to handle at the same time, the non-dispositive motions.

22 MR. TRIPI: Yes, your Honor.

23 MAGISTRATE JUDGE ROEMER: So we'll set a date when
24 that time comes the, just to make sure it's clear, Judge
25 Wolford is handling the first, third, fourth, sixth and eighth

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2 issues you raised.

3 MR. COVERT: That's correct.

4 MAGISTRATE JUDGE ROEMER: So everyone is on the
5 same page.

6 MR. COVERT: Yes, that was the docket entry, yes.

7 MAGISTRATE JUDGE ROEMER: Anything else for Mr.
8 Jenkins?

9 MR. COVERT: No.

10 MAGISTRATE JUDGE ROEMER: We'll go ahead with the
11 oral argument on the non-dispositive motions. I think first
12 we'll handle Defendant Pirk's request to maintain his second
13 counsel. Mr. Easton, do you want to be heard on that?

14 MR. EASTON: Yes, your Honor. We last addressed
15 this issue back in June, and I think since June, the posture of
16 this case has changed considerably. The controlling legal
17 principles are not in dispute here. And I think the factors
18 are in order to remove counsel, it's certainly within the
19 Court's discretion. But there are four factors you need to
20 avoid. Disruption, and I believe that removal now will
21 certainly cause disruption. Whether the case is unusually
22 complex, which I think there could be really no argument in
23 this particular case, especially in regard to Mr. Pirk who is
24 the national president, that this case is unusually complex.
25 At this juncture, there are 12 defendants on route to trial.

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2 There are all sorts of issues. There are complicated discovery
3 issues and a massive amount of discovery. And to remove a
4 counsel right now for Mr. Pirk would certainly, in the context
5 of the unusually complex nature of the case, it would certainly
6 create disruption both to the defense team, to Mr. Pirk, his
7 family and to the Court.

8 And the other factors are within the Court's
9 discretion. And in this particular case, I believe what's gone
10 on up to this point, as demonstrated, it's an extremely
11 complicated case. And Mr. Pirk's position as national
12 president of a multi-state RICO, according to the government,
13 poses tremendous challenges on the defense. And Ms. Meyers
14 Buth and I, between the two of us, are struggling to meet our
15 challenges. I think also the Court should be aware that in
16 this particular case, it implicates Sixth Amendment rights as
17 well. It won't save -- I don't think it will save any money.

18 MAGISTRATE JUDGE ROEMER: I was going to ask you
19 that because, basically, I was assuming that you were splitting
20 up the duties between you. It's not that she is doing certain
21 duties and you're doing the same duties or you're going to
22 check on what she did, so to speak.

23 MR. EASTON: We certainly don't duplicate. We
24 divvy up the case and delegate. And for one of us to then
25 assume and relearn and learn for the first time what the other

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2 one has done, it's not going to save any money, it's going to
3 spend money. The travel costs alone for me to come to
4 Rochester and Buffalo or for Ms. Meyers Buth to go to Rochester
5 would eat up any de minimus saving here. There is no
6 compelling reason to disrupt the team at this point. It will
7 cause, I think, an incalculable disruption to scheduling, to
8 Mr. Pirk's right to counsel to remove us at this juncture.

9 The other factor that I didn't bring up was
10 whether the decision to not to seek the death penalty occurred
11 late or early in the litigation. It did occur early in the
12 litigation here. But I don't think that is really the
13 dispositive factor here, especially in light of the fact that
14 we've had two counsel here for nearly a year. And now to
15 radically reconfigure the defense team at this juncture, I
16 think, would be disruptive.

17 MAGISTRATE JUDGE ROEMER: Thank you, Mr. Tripi.

18 MR. TRIPI: Judge, I briefed the issue twice.
19 Once in the initial motion to remove second counsel; once in my
20 most recent. I'm not going to belabor the point. I think the
21 Court has the salient information here. I would just note,
22 this Court did order removal back in June of 2016. And as I
23 understand it, only permitted second counsel to remain through
24 the filing of motions. That has been completed. Hearings have
25 been ordered at this point in time. It's a matter of moving

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2 towards trial. There are already 12 other attorneys in the
3 case. The defense are working in an organized group. They've
4 joined in motions, they divided up motions, they joined in each
5 other's motions. Most of them, almost all of them, are
6 assigned at tax payer expense. I don't see the disruption
7 argument. It's the same case, it's the same defense team
8 working together. And all of the factors that compelled this
9 Court to order removal in the first instance would be the same
10 today. Thank you.

11 MAGISTRATE JUDGE ROEMER: Thank you.

12 MR. STACHOWSKI: I just want to add a little to
13 that. We had a case that went on for about four years and Mr.
14 Easton was involved in it --

15 MR. TRIPI: I would object, this is not Mr.
16 Stachowski's motion.

17 MR. STACHOWSKI: Mr. Molloy was in that case. It
18 was helpful because they divided things up and we divided other
19 things up. When he suggests it saves money, they did division
20 of preparation for trial as well, the two of them, Mr. Easton
21 and his co-counsel. And it also helped at the end when it came
22 to settlement time because we had extra people with -- Mr.
23 Easton's client had the most exposure, as I recollect, and he
24 was able to get us all together and we ended up resolving it
25 during jury selection. So having that extra counsel was very

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2 helpful. It was a RICO case just like this one and it had a
3 lot of murders involved in it and drug dealing. So I thought
4 it was very helpful to have that extra counsel.

5 MAGISTRATE JUDGE ROEMER: Okay.

6 MR. TRIPI: Mr. Stachowski's comment is just
7 further evidence that in these multi-defendant cases, even
8 lawyers who are not assigned to a particular defendant work
9 together. He was talking about lawyers that weren't even
10 assigned to him and benefited him. It goes to show you that
11 they're all working at one time at tax payer expense.

12 MR. HOOVER: Judge, may I be heard on this even
13 though it's not my motion?

14 MAGISTRATE JUDGE ROEMER: Sure.

15 MR. HOOVER: For the record, Tim Hoover. I wanted
16 to add two things. One is, we represent Mr. Scanlon, pursuant
17 to the CJA, the appointment is Mr. Oliverio, and we have -- and
18 this is no secret, because everyone has filed a notice of
19 appearance, two partners and two associates, not full time,
20 because we all have different matters, working on this to
21 provide adequate representation to Mr. Scanlon, who it's fair
22 to say from the indictment, is differently situated than Mr.
23 Pirk by counts and things like that. Secondly, I think it's
24 important, the government can't have it both ways on this
25 coordination on this issue. When we argued a motion on *Brady*

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2 material, sometime last year, I argued it, Mr. Tripi made a big
3 point of saying that, you know, I know how these motions work.
4 Someone files them, but not everyone really necessarily joins.
5 He was irked about what we said the government's understanding
6 was or wasn't of its *Brady* obligations. You can't have it both
7 ways here. The idea it's all one team or they are not working
8 together. We have four people on the case. I believe Connors
9 and Villardo has two or three people working. Now, they are
10 retained, I understand. But the idea that one defense counsel
11 per a defendant in the set of charges as complex as facing any
12 of these defendants, let alone Mr. Pirk, I just thought that
13 was relevant information as the Court assesses the motion.

14 MAGISTRATE JUDGE ROEMER: Thank you.

15 MR. TRIPI: Just a very brief response to that,
16 Judge. I was not irked at the fact that counsel were joining
17 and working together. I was irked, if that is a proper term,
18 of the borderline personal attacks that I perceived from Mr.
19 Hoover that I didn't think everyone else would have joined in,
20 that's all.

21 MAGISTRATE JUDGE ROEMER: Okay. We're going to go
22 now to discovery under Rule 16. There are motions pending
23 regarding that. Somebody want to go first for the defense
24 counsel? Don't feel like you have to argue everything. I've
25 read all of the papers and I have a handle on the various

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2 issues.

3 Mr. Hoover?

4 MR. HOOVER: If I could now, not on the discovery
5 motions, per se, but the unsealing of the search warrant
6 application, if that --

7 MAGISTRATE JUDGE ROEMER: That's a different topic
8 I have.

9 MR. HOOVER: It is different. I don't have
10 anything to add to the papers.

11 MAGISTRATE JUDGE ROEMER: Mr. Mahoney, you had
12 something, but you wanted an inventory of -- you want to
13 explain that?

14 MR. MAHONEY: Judge, what I was bringing to the
15 attention of the Court in my motion and then in my reply to the
16 government was that the big difficulty we have in federal
17 discovery these days is that too often it stops with the
18 government's representation that they've complied with the rule
19 and the Court and the defense have no idea what the government
20 has that it's not disclosing. And I think that takes sort of
21 the judge out of the equation in terms of ensuring that Rule 16
22 is complied with. I just made the suggestion that, and I think
23 it's the kind of thing that could be dealt with in a standing
24 order, and it's not really about this case alone, it's
25 certainly not any accusation about the good faith of the

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2 government, but I think the only way, in an orderly way to
3 decide discovery issues is have the government make it known
4 the kinds of materials they have. And if there is anything
5 they have they think is privileged work product or otherwise
6 not subject to disclosure, they should specifically let us know
7 and let the Court know about it so we can argue about it or,
8 otherwise, give us everything. Because Rule 16 was amended by
9 the Rules Advisory Committee a long time ago to require
10 disclosure of anything that is material to preparing a defense.
11 And the rules committee notes said at that time that it was --
12 their intention was that should include any discussion about
13 *Brady* because the idea that anything is material to preparing
14 for the defense would include things that are adverse things
15 that are favorable and things that are in between. And to me,
16 it seems to me it would make a much more simple and streamline
17 way to address discovery in general and then the Court would be
18 confident and the defense could be confident that there are not
19 things in the government's possession or control that are
20 really important to the case that are not privileged and not
21 otherwise required to be disclosed, and then it would all be
22 sort of above board and transparent. So that is my suggestion.
23 And I point out specific examples of problems with that. I
24 also raised an issue of how we deal with prior statements under
25 Rule 26.2. I think that more scrutiny is required of that.

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2 But otherwise, I've got it all in my papers, Judge.

3 MAGISTRATE JUDGE ROEMER: Okay, thank you. Mr.
4 Tripi.

5 MR. TRIPI: Just very briefly, your Honor. Again,
6 I've also responded in writing, so I'm not going to belabor the
7 issues. I don't perceive Mr. Mahoney's motion as specifying
8 any items in particular that he believes are being withheld or
9 that won't be disclosed or haven't been already disclosed
10 pursuant to Rule 16. Obviously, "give us everything," is not
11 the standard. 3500 material, there is a different standard
12 applicable to that. And then under Rule 16, I think it's
13 (a)(2), there are certain reports and memoranda and internal
14 documents that are not subject to disclosure. So, there is no
15 rule that requires the government to give defense and the
16 counsel an itemization of everything it has. We do make an
17 effort to provide items in an orderly fashion. We can always
18 do better in that regard. It's difficult when you get things
19 at different times, but we try to provide discovery in a
20 searchable format with cover letters that enable counsel to
21 identify what's being disclosed. And I don't think there is
22 any suggestion that the government has not or will not continue
23 to comply with its obligations and that's really all I have to
24 say on that.

25 MAGISTRATE JUDGE ROEMER: Okay, thank you. Should

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2 have done this before. As far as I can tell, Mr. Brautigam is
3 not here.

4 MR. TRIPI: I do not see him here.

5 MAGISTRATE JUDGE ROEMER: Is anyone covering for
6 him?

7 MR. COVERT: I'm happy to appear.

8 MAGISTRATE JUDGE ROEMER: Mr. Catalano, anyone
9 seen Mr. Catalano?

10 MR. DEAL: He is not. I'll appear for him.

11 MAGISTRATE JUDGE ROEMER: Mr. Deal will appear for
12 Mr. Catalano. And Mr. Keefe?

13 MR. TRIPI: Mr. Keefe called me, your Honor. We
14 have already, A, his client waived his appearance; and B, we've
15 already litigated all of Mr. Keefe's motions and suppression
16 hearings. And I believe the Court has already decided the
17 suppression issues regarding his client, so he told me he
18 didn't intend to be here.

19 MAGISTRATE JUDGE ROEMER: Good, thank you. Now
20 we'll go to Rule 16 expert disclosures and scientific tests and
21 reports. Anybody want to speak on that? Again, I'll consider
22 it on the papers.

23 MR. TRIPI: Judge, we'll be submitting those
24 disclosures in accordance with the pretrial order.

25 MAGISTRATE JUDGE ROEMER: Okay. Rule 12, in

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2 particular, the Rule 12(b)(4)(B) notice of the government's
3 intent to use any evidence.

4 MR. TRIPI: Judge, with every disclosure the
5 government has made, and, again, in our responses, we have
6 provided that disclosure.

7 MAGISTRATE JUDGE ROEMER: Witness statements.

8 MR. HOOVER: Judge, could I go back to the
9 scientific tests? Not an argument as much as an inquiry.

10 MAGISTRATE JUDGE ROEMER: Sure.

11 MR. HOOVER: I've had conversations with Mr. Tripi
12 where he has been frank that there are additional items in
13 process and under way, in other words, there are more things to
14 come. Maybe he can comment, if he wants, or if the Court wants
15 him to comment, if there are scientific tests done, I'm not
16 aware that there are, and they are done and completed, I think,
17 under Rule 16, they have to be produced. In other words, it's
18 not a matter of waiting for the pretrial order.

19 MR. TRIPI: No. Scientific testing that has been
20 done has been disclosed. It is in the discovery that relates
21 to --

22 MAGISTRATE JUDGE ROEMER: Try to speak in the
23 microphone.

24 MR. TRIPI: I'm sorry. The scientific testing
25 that has been done, the reports have been provided in

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2 discovery.

3 MAGISTRATE JUDGE ROEMER: Is there still more
4 scientific testing being done, to your knowledge?

5 MR. TRIPI: One thing, for example, the FBI is
6 sending a hard drive down to Quantico. Local capabilities have
7 been unable to do the analysis on a particular hard drive. So
8 that is being sent down to experts in Quantico. It hasn't been
9 accomplished yet in terms of the review and the analysis. That
10 is one example of one thing they may not be able to give us any
11 information or they may -- that is an example of something that
12 is still on the way.

13 MAGISTRATE JUDGE ROEMER: I have several things
14 listed: Controlled substance, there are no more controlled
15 substance testing, that has all been provided?

16 MR. TRIPI: We are sending a couple of additional
17 items to the laboratory. Those items were recovered from the
18 North Tonawanda clubhouse. That hasn't been completed yet. A
19 lot of them are prescription pills and marijuana and things
20 like that that we're just sending for confirmatory testing.

21 MAGISTRATE JUDGE ROEMER: Firearms, ammunition,
22 casings, are there any?

23 MR. TRIPI: Those reports have been provided.

24 MAGISTRATE JUDGE ROEMER: DNA testing.

25 MR. TRIPI: There have been DNA reports provided,

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2 most specifically, as it relates of Andre Jenkins. Forgive me,
3 I'm working off the top of my head. Gregory Willson, there is
4 DNA in that regard. If any additional items are submitted for
5 DNA, we'll get those reports turned over.

6 MAGISTRATE JUDGE ROEMER: But, to your knowledge,
7 there is nobody testing for DNA at this point for DNA?

8 MR. TRIPI: To my knowledge. Forgive me if I'm
9 forgetting, there is nothing in testing of DNA that hasn't been
10 turned over.

11 MAGISTRATE JUDGE ROEMER: Was that helpful, Mr.
12 Hoover?

13 MR. HOOVER: It is, Judge. Thank you.

14 MAGISTRATE JUDGE ROEMER: Grand Jury statements,
15 in particular 3500 material, and, I guess, grand jury testimony
16 would be 3500 material?

17 MR. TRIPI: Yes.

18 MAGISTRATE JUDGE ROEMER: And, Mr. Tripi, you want
19 to respond to that?

20 MR. TRIPI: Judge, I responded in my papers. Just
21 3500 material will be disclosed no later than as it's required
22 by law, but usually we're going to make efforts to do it much,
23 much earlier. I've been in contact with Mr. Hoover. I do
24 intend to work on a protective order that is tailored to 3500
25 material and I intend to get that out on a rolling basis well

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2 before trial.

3 MAGISTRATE JUDGE ROEMER: Now, is it your policy
4 generally that you turn over, like, FBI 302s at the same time?

5 MR. TRIPI: Yes. As a matter of policy, we turn
6 those over as 3500 material.

7 MAGISTRATE JUDGE ROEMER: Okay. Anything from
8 defense on that?

9 MR. HOOVER: Not from me, Judge.

10 MAGISTRATE JUDGE ROEMER: Any *Giglio*?

11 MR. TRIPI: Judge, we've argued quite a bit about
12 that. We've argued twice before Judge Wolford. I think it
13 would be safe to say there is a disagreement on some of what it
14 means. Again, the government is turning over and will turn
15 over *Brady*, exculpatory material, *Brady* material, as soon as
16 we're aware of it.

17 MAGISTRATE JUDGE ROEMER: Mr. Hoover?

18 MR. HOOVER: There is a stark disagreement about
19 whether *Giglio* is *Brady*. And we view that it is. I think what
20 we can say, Judge, is it may be mooted in some respect if there
21 is this turn over of 3500/*Giglio* that we're working on. I
22 think the other thing we can say is, no one is filing it today,
23 but there may be another motion filed on *Brady* based on things
24 that may be filed.

25 MAGISTRATE JUDGE ROEMER: Mr. Okay. I want to

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2 note Mr. Okay came in. He is here.

3 Mr. Okay, you made a request for internal affairs
4 and personnel files of all law enforcement witnesses.

5 Mr. Tripi, did you want to respond to that
6 request?

7 MR. TRIPI: Judge, obviously that disclosure would
8 be improper. That is a request, essentially, for *Giglio*
9 information that may be in the files of law enforcement
10 personnel. The Court probably is aware that we have a
11 procedure in place for that internally. We have a *Giglio*
12 officer. Once we identify witnesses who are going to be
13 testifying, the trial law enforcement witnesses, those
14 witnesses -- a list gets provided to our *Giglio* officer, who,
15 within our office, is Joseph Karaszewski, our appellate chief.
16 He makes the inquiries of all of the law enforcement agencies.
17 They return the information to him. If there is anything in
18 those files, upon his request, he reviews the items in terms of
19 whether or not they are subject to disclosure or in camera
20 review and that is how that gets handled. Obviously we oppose
21 cart blanche turning over law enforcement internal personnel
22 files.

23 MAGISTRATE JUDGE ROEMER: Mr. Easton and Ms.
24 Meyers Buth also brought up an incident related to the Chosen
25 Few investigation. Are any of the agents involved in this case

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2 the same agents that were involved there?

3 MR. TRIPI: No. Well, tangentially that was a FBI
4 Squad 4 case, but if we're talking about the actual case agents
5 that were assigned, no.

6 MAGISTRATE JUDGE ROEMER: Ms. Meyers Buth?

7 MS. MEYERS BUTH: Judge, my only request on that,
8 if you recall the suppression hearing that Mr. Easton and I
9 just had, the first agent in Florida who had taken a statement
10 from Mr. Pirk, told me that he didn't mail his report back,
11 that nowadays they E file the report and all of the case file
12 materials are available to any of the agents working on the
13 case via computer. So it's not just if Agent Jensen, who was
14 one of the agents on the Chosen Few case, was active in the
15 investigation of the Kingsmen, but it's also whether any of the
16 agents relied on reports that he may have written because there
17 was a finding in that case that Agent Jensen had not been
18 forthright with the Court, and a couple of affidavits that he
19 submitted: I think one Article 3 to Judge Skretny, and there
20 may have been at least one more. So I appreciate the
21 government's response and its indication that it will comply
22 with its *Brady* obligation, but I would ask, because of the
23 specific circumstances of the Chosen Few investigation done by
24 the FBI Safe Streets Task Force, and because it overlapped in
25 time with the Kingsmen investigation, that the government make

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2 a specific inquiry to the FBI for any additional documents that
3 may be *Brady*.

4 I'll give you an example. The Chosen Few
5 investigation by the FBI went on from 2003 until the case was
6 dismissed in 2011. This case is charged in the indictment from
7 '06 to '16. There are affidavits in the Chosen Few case that
8 reference either specific members of the Kingsmen or the
9 Kingsmen Motorcycle Club and efforts that the Kingsmen
10 Motorcycle Club allegedly was making towards keeping the peace
11 with the Chosen Few. Mr. Easton and I put forth that if, for
12 example, there were reports about the Kingsmen that pertained
13 to their not being a one-percent club or they are not engaging
14 in certain violent activities, that those may be *Brady* because
15 they would be exculpatory, then, in contrary to the theory of
16 the case that the government has put forth. Further, if our
17 client, specifically Mr. Pirk, was not mentioned as taking part
18 in any prior violent acts that the FBI may have been aware of
19 through its joint investigation of both the Chosen Few and the
20 Kingsmen during that time, that that may also constitute *Brady*
21 depending on the substance. All I would ask is Mr. Tripi, who
22 was not part of the Chosen Few case, make an inquiry to the FBI
23 about what reports are available so somebody looks at those
24 reports to see whether or not, in fact, there may be *Brady*.
25 And if there is a question, those can be submitted to the Court

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2 in camera. But certainly, the first, at least half of this
3 case, we know from documents in the Chosen Few case that the
4 Kingsmen were being investigated by the FBI, the same unit,
5 even between '06 and '11 here at least. So I'm concerned
6 because of the -- and I don't know if any of the other defense
7 attorneys were involved in that case, there were specific
8 allegations against agents that there was either mishandling of
9 informants, that there was a lack of forthrightness with the
10 Court. And so my interest, having come from that experience,
11 I'm very, very concerned that there may, in fact, be documents
12 about the Kingsmen that would constitute *Brady* that derive from
13 that case.

14 MAGISTRATE JUDGE ROEMER: Mr. Tripi.

15 MR. TRIPI: Just briefly. Although this
16 indictment dates back to certain conduct dating back to 2006,
17 the FBI investigation of the Kingsmen did not begin until 2014.
18 So there was not overlapping investigations as it relates to
19 this case. But, I could also say that Agent Jensen had no
20 involvement in this case. That was the agent that Ms. Meyers
21 Buth referenced. But we will, I believe we've already done
22 this, review internally, but we'll make sure it's done. And if
23 there is any *Brady*, we'll bring it at least to your attention
24 if we have a question about it or disclose it, if it is
25 appropriate.

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2 MS. MEYERS BUTH: Judge, you can't say it didn't
3 have anything to do with this case. This case is charged from
4 '06 to '16. We know from the Chosen Few investigation that the
5 Kingsmen were being investigated by the FBI between '06 and
6 '11. Now, my paper trail stops at '11 because that is when the
7 Chosen Few case was dismissed because of governmental
8 misconduct on the part of the agents, primarily, and I can't
9 make a specific reference, but to say this investigation only
10 started in '14 does not resolve this issue because things that
11 they had investigated that maybe, whether it's 404(b) or direct
12 evidence to prove these charges, may, in fact, be *Brady*. So
13 it's the only point I'll make this morning, but I'm very, very
14 -- I want to stress it because it was such an ordeal to get
15 documents in that prior case that I know from reading the
16 affidavits that there was an active investigation of the
17 Kingsmen by the FBI. To say that this investigation is somehow
18 separate from that, maybe it is, but that is inconsistent with
19 the theory that has been set forth by the government in this
20 case because they argued from '06 to '16, all of these
21 activities were being undertaken. If they want to limit it
22 from '14 on, I'm sure that will be fine with us. But until
23 that is what they actually do, we're entitled to materials that
24 predate that. And if the Court wants me to, I have some of the
25 affidavits from the Chosen Few. I can submit those in a

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2 supplemental motion so the Court can see the agents saying
3 there is an investigation into the Kingsmen as opposed to me
4 just representing that. I'm happy to do that. I could do it
5 by Monday, if that would be helpful.

6 MAGISTRATE JUDGE ROEMER: Mr. Tripi, if Ms. Meyers
7 Buth is willing to do that, wouldn't that assist you in your
8 review of those documents?

9 MR. TRIPI: Sure, Judge. I mean, any information
10 that she wants us to take a look at or provide the Court, we
11 wouldn't be unaccepting of that. But all I was saying a moment
12 ago, it's a different investigation and different investigative
13 team and a different prosecution team. That is all I was
14 saying.

15 MAGISTRATE JUDGE ROEMER: But, you know, I haven't
16 researched this, but I suppose if there was some information
17 came up in a separate investigation that is relevant to this
18 investigation, I don't know what necessarily that information
19 would be.

20 MR. TRIPI: Right.

21 MAGISTRATE JUDGE ROEMER: And it's in the
22 possession of the government and the government knows that it
23 has it, and say it's *Brady* or *Giglio* or for some other reasons
24 disclosable, that the government would have a duty to disclose
25 it, right?

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2 MR. TRIPI: We don't disagree with that concept at
3 all.

4 MAGISTRATE JUDGE ROEMER: Ms. Meyers Buth, you
5 would be willing to do that early next week?

6 MS. MEYERS BUTH: Absolutely. I have to take a
7 look, and, again, at the documents, it may be more appropriate
8 to file the motion under seal, but I'll talk to Mr. Tripi about
9 that before I make the filing on Monday.

10 MAGISTRATE JUDGE ROEMER: Okay, thank you.

11 MR. TRIPI: The one thing I should add, to the
12 extent it was a different prosecution team and investigation
13 team, for example, if there is a report from 2010 and someone
14 was interviewed and they don't mention Mr. Pirk, that is not
15 necessarily *Brady* if they weren't asking about Mr. Pirk. That
16 is my only point.

17 MAGISTRATE JUDGE ROEMER: Okay. Next topic,
18 disclosure of informant identities. Anybody want to add to
19 what's in the papers?

20 MR. HOOVER: I have nothing to argue, rest on the
21 papers.

22 MAGISTRATE JUDGE ROEMER: Okay. Rule 404(b), 608
23 and 609 evidence.

24 MR. HOOVER: I rest on my papers, Judge.

25 MAGISTRATE JUDGE ROEMER: Okay. Coconspirator

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2 statements?

3 MR. HOOVER: Same.

4 MAGISTRATE JUDGE ROEMER: Unsealing of search
5 warrants? I believe now the search warrants we're talking
6 about are the search warrants for the clubhouses. Mr. Hoover?

7 MR. HOOVER: Judge, we had what was, I guess, a
8 mini argument on this at one of the earlier appearances. And I
9 think you hit the nail right on the head earlier when you told
10 me to hang on because this isn't a Rule 16 issue. It's not a
11 Rule 16 issue. It's an issue of there is a judicial document
12 sitting in the courthouse on the second floor under seal that a
13 different magistrate, at that time, presumably because of what
14 was presented to him at that point, decided met the extremely
15 high test, override the common law right of access, the first
16 amendment right of access and the Second Circuit and the
17 Supreme Court standard for sealing. That was anywhere from 7
18 to 18 months ago. My guess is it probably was a form order
19 with an oral application without anything talking about the *New*
20 *York Times* case or the *Pyramid Company's* case, et cetera. But
21 the issue before you is not ordering the government to do
22 anything, but whether the Court decides that it's going to
23 unseal the document or you can do it different ways that
24 doesn't result in unsealing at all. You can partially unseal.
25 You can keep it sealed, but issue an order that it's directed

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2 that gives it to defense counsel under the currently existing
3 protective order or with a nod towards what I would call the
4 generic government claim that there is some informant issue or
5 something like that, an "attorneys' eyes only" protective
6 order. So it's not a matter of ordering the government to do
7 anything or to expose it to the world, although I think it's
8 important to emphasize the standard is high. And there may be
9 other cases where this motion could be made -- quick work could
10 be made of it, but not here and not for Mr. Scanlon because he
11 is charged in count 41 and count 45 with maintaining the Olean
12 clubhouse for the purpose of dealing drugs and maintaining,
13 along with a dozen or so other folks, the South Buffalo
14 clubhouse for the purpose of dealing drugs. He has put in, and
15 we put in on reply an affidavit or a declaration setting forth
16 his standing, to the extent that is an issue on this motion, we
17 don't think it is with regard to Olean. So we have in front of
18 us, how can --

19 MAGISTRATE JUDGE ROEMER: Why isn't the standing
20 an issue?

21 MR. HOOVER: What's that?

22 MAGISTRATE JUDGE ROEMER: Why isn't the standing
23 an issue?

24 MR. HOOVER: Here is what I would say on the
25 standing. For purposes of whether it should be unsealed or

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2 not, I think the analysis doesn't bear on whether or not the
3 person who is asking for the unsealing has standing to
4 challenge. This could be Joe Public making the motion. What I
5 would say, though, is the interest in the defendant in
6 unsealing or release of it is even more compelling because he
7 does have standing, if that makes sense. He doesn't need
8 standing, no one needs standing to challenge.

9 MAGISTRATE JUDGE ROEMER: Why doesn't he have
10 standing?

11 MR. HOOVER: In Olean? He has standing per the
12 declaration that he submitted that he was a member of the
13 Kingsmen, he was a member of the Olean clubhouse, he spent time
14 there, et cetera, et cetera.

15 MAGISTRATE JUDGE ROEMER: But he -- it was a
16 little confusing to me. There was some indication that they
17 bought the clubhouse, but I wasn't sure if he was ultimately a
18 part owner of the clubhouse.

19 MR. HOOVER: I don't believe he is on the title,
20 Judge. I'm pulling up the declaration, but, yes, the group or
21 the club purchased the clubhouse. I'm looking at, this is
22 document 476-1, they renovated the clubhouse, they spent time
23 there. I think he had an expectation of privacy there, so, to
24 me, that equals standing.

25 MAGISTRATE JUDGE ROEMER: One of the cases cited

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2 was the *Gotti* case for the Ravenite Social Club, and that seems
3 to be contrary to your position.

4 MR. HOOVER: And maybe once I make my motion to
5 suppress, after I have reviewed the affidavit, the Court will
6 rule I don't have standing to challenge it. But my point here
7 is, I don't need standing, I don't need to be a charged
8 defendant, I don't need to be a defendant who had an
9 expectation of privacy in Olean to make this motion or for the
10 Court to consider what the other magistrate decided to do under
11 seal. It could be a member of the public, it could be anyone.
12 And the government --

13 MAGISTRATE JUDGE ROEMER: Your point is, you don't
14 get up to bat unless you get it unsealed first.

15 MR. HOOVER: I don't get up to bat. And I suppose
16 it's facially attractive for the government's argument that you
17 can do it. I mean, you're not defense counsel.

18 MAGISTRATE JUDGE ROEMER: You mean in an in camera
19 review here?

20 MR. HOOVER: An in camera review. You take a look
21 at it and you determine whether or not there is probable cause.
22 That is not the standard. Here the standard is whether there
23 is a compelling government interest to maintain the seal and
24 whether there are no lesser alternatives to maintain the seal
25 or if there are some lesser alternatives. And when I say you

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2 don't have to wholesale unseal it, that is what the
3 alternatives are: Redacting it, partially unseal, and the one
4 that makes the most sense and nods to the government's concerns
5 that it says exist here are not unsealing it, but directing
6 that the clerk provide it to the defense counsel under a
7 protective order. When you look at the cases on the standard
8 to seal, whether or not it was met the first time, they don't
9 meet it here 18 months later by saying there is a generic
10 informant concern. I only speak for Mr. Scanlon here, but
11 about a year now that he has been under the charge and before
12 the Court, we haven't -- he hasn't inappropriately dealt with
13 any witnesses. We followed the protective order. We're not
14 aware of anyone in the case inappropriately dealing with any
15 witnesses. If you have that concern, if it's the concern that
16 is at the tipping point, then direct that it be provided to the
17 attorneys, attorneys' eyes only, and we'll review it that way
18 -- and that way we can bring the motion or I can bring the
19 motion challenging those seizures. Thank you.

20 MAGISTRATE JUDGE ROEMER: Thank you. Mr. Tripi?

21 MR. TRIPI: Judge, these search warrants were
22 signed by Magistrate Judge Schroeder. There is one affidavit,
23 master affidavit, in support of seven searches of some
24 Kingsmen-related premises. He ordered that affidavit sealed
25 based upon his findings in that affidavit with respect to

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2 disclosure of an ongoing investigation, threats to witnesses.
3 You can review the affidavit in camera itself and see what
4 Judge Schroeder relied upon. But I think that, essentially,
5 the argument here in Mr. Scanlon's papers is, essentially, that
6 membership equals a privilege, a privilege to just cart blanche
7 unseal documents, a Fourth Amendment privilege, and that simply
8 is not the law. I'm a member of BJs, I don't have standing to
9 contest a search of BJs. I'm a member of an Elks Lodge, I
10 don't have standing to necessarily contest the search of an
11 Elks Lodge, certainly not on the conclusory affidavit that Mr.
12 Scanlon submitted, which basically says I'm a member. It gives
13 the Court nothing more than that. So that is that argument
14 that I just made is consistent with *Smith vs. Maryland*, the
15 Fourth Amendment protects people not places. *Rakas v.*
16 *Illinois*, Supreme Court case, the Court rejected a target
17 theory of standing. So this is a standing issue because the
18 documents have been sealed based upon a finding by a magistrate
19 judge. So, our position is it's this Court's duty at this
20 juncture to merely look at those documents and see if the
21 magistrate judge who found probable cause or who issued the
22 sealing order had a substantial basis to do so. And I think
23 when you do that review, you'll find that he did. This is
24 essentially an end around attempt.

25 MAGISTRATE JUDGE ROEMER: It's funny because I was

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2 just going to say that it seems odd to me that to review these,
3 review the affidavit to see if there was probable cause is, in
4 a sense, conceding standing, and then making a determination
5 that the search warrant was okay in the first instance.

6 MR. TRIPI: No, it's not conceding standing. I've
7 argued quite clear, you don't even have to conduct the review.
8 But if you do find there is some standing, which I don't
9 believe Scanlon has established, for certain, even if you got
10 to that point, that you don't need to unseal cart blanche all
11 of the documents for seven clubhouses for people that have not
12 asserted their rights. You can do what the Court needs to do
13 without that disclosure, even partial disclosure, to the
14 defense. And the end around point that I was trying to make
15 was what one will find in that search warrant affidavit are
16 essentially synopsis and summaries of witnesses that will
17 testify at a trial. So the reason that everyone wants it
18 disclosed is obvious and understandable from the defense
19 perspective, but it's not the law. It's early disclosure of
20 Jencks. It opens up a panoply of issues. Now we have
21 confirmation a year before trial of who the witnesses are,
22 especially if it's totally unsealed as has been suggested, then
23 anyone can have access to the document theoretically. This
24 issue, there is not one circuit case cited by the defense for
25 the position that they are maintaining here. I've cited a

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2 Ninth Circuit case in *Napier*. Hardly a base of conservative
3 principle, said, essentially, the defendant does not have an
4 absolute right to contest the veracity of information contained
5 in the search warrant. That is essentially what they are
6 asking you to find here, because they're a Kingsmen, they get a
7 right to review the entire document when this Court doesn't
8 need, quite frankly, anyone's help to review affidavits
9 underlying search warrants, if you even determine that there is
10 standing. *Cartagena*, a First Circuit case also denied
11 disclosure of information that would tend to identify
12 informants. It's a case that I have cited. Again, that is
13 essentially what you would have here, and the affidavit might
14 characterize witnesses as A, B, C, D, but it would be quite
15 clearly of anyone with any type of knowledge of this case. Now
16 that discovery has been provided and all things of that nature,
17 it's not going to be hard to figure out who everybody is. And
18 as I've mentioned, you've got to overlay that with the certain
19 concerns, that is, Judge Schroeder didn't even have the benefit
20 of. There was no indictment at the time. Judge Schroeder had
21 the affidavits in 2015 prior to the searches in August of 2015.
22 And he ordered it sealed at that point. Now we have an
23 indictment charging things ranging from assault to murder,
24 charging as a part of the enterprise's activities acts
25 involving witness tampering. That only supports further the

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2 need to continue the sealing. Now, there has been a finding by
3 a grand jury that this is the type of activity that the
4 enterprise engages in. These 16 members who were charged and
5 the 12 that remain are a snapshot of the amount of members in
6 this enterprise, which is in four states, maybe five by now.
7 So, you can review the affidavits and make the determination
8 that sealing is and was appropriate, and I think you should.
9 Thank you.

10 MAGISTRATE JUDGE ROEMER: Mr. Hoover?

11 MR. HOOVER: Just in reply, Judge, was there a
12 government written motion to seal originally? We don't know.
13 Probably not. What order did Judge Schroeder sign at the
14 original time of sealing? Probably a quarter page form,
15 government order or maybe it was just oral. What findings did
16 he make under *Pyramid Company, In Re New York Times*, the
17 Supreme Court precedent that there was an extreme governmental
18 interest and no other options, probably none, with all due
19 respect, because it was just a general request by Mr. Tripi.
20 What was the basis to seal the entire docket as opposed to just
21 the search warrant affidavit? None. What is the basis under
22 which Mr. Tripi is able to provide certain things and not
23 others to the defense, all of which were originally sealed?
24 I'm not sure. I don't know that he has gone back to get
25 unsealing orders on those.

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2 MR. TRIPI: Well, the affidavit.

3 MR. HOOVER: Excuse me, let me finish, please.

4 What is the basis for continued sealing in this instance other
5 than these generic concerns with regard to wanting it for trial
6 access? I think he has got it the other way. He doesn't want
7 to disclose because it impedes his trial preparation as opposed
8 to it assisting ours. And in regard to it all being in one as
9 opposed to seven, that is a decision that he or someone else
10 made a long time ago. But what is the answer to how does it
11 impinge theoretically governmental interest for it not to be
12 unsealed, but to be provided to attorneys via an "attorneys'
13 eyes only" protective order with this group of attorneys that
14 this Court is aware of? None.

15 And, finally, Judge, and I know that you were on
16 this committee that adopted local Rule 41. The idea of that
17 rule, as I understood it, as a participating member and it
18 eventually came out is not that things are sealed forever, it's
19 that they were sealed, if there is -- there was a great or
20 urgent need. And the bottom line is all this talk about
21 standing and you review it, you got it exactly right. I'm
22 going to review it for probable cause, but it, essentially,
23 determines that there is standing and skips the process that
24 can be battled out down the line once we make the motion once
25 it is reviewed. The motion can be filed under seal, just like

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2 Mr. Connors and Mr. Grable redacted the search warrant
3 application for the Enix search in Florida.

4 And, finally, on standing, I don't mean to be
5 repetitive. But this is posited as a litigation strategy
6 matter between two adversaries. This is a judicial record
7 access issue under which there is a heightened governmental or,
8 excuse me, heightened public interest, First Amendment interest
9 and common law interest all on top of the fact that he does
10 have standing, if that is any consideration, and that he is
11 charged with the maintaining the places he was searched at a
12 time period during and at the time of the search for the
13 purposes of dealing drugs. For us, it might be a hard, in some
14 other instance, it might be different, in some other case,
15 informant's identities, as far as being disclosed under Rule
16 16, is a different story. This is a very limited and basically
17 comes down to how does the Court decide how it handles its
18 judicial documents. Thank you.

19 MR. TRIPI: The items that were disclosed were the
20 items that are unsealed, the search warrant application cover
21 sheet, the search warrant itself, the search warrant return.
22 Items that were sealed were not disclosed, quite simple. The
23 standard is not that I want it for trial preparation. That is
24 not the standard. Mr. Hoover can't cite one case that says
25 that. The standard is not, "I want it because I want to make a

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2 Franks motion or I want to see if I can make a Franks motion.
3 That is not the standard, and this Court should deny disclosure
4 based on what it has before it. The Second Circuit itself in
5 the matter of *New York Times* says the First Amendment right of
6 access, which Mr. Hoover, knowing he doesn't have standing and
7 knowing that he hasn't established what he needs to, through
8 other issues, is standing on this First Amendment right of
9 access to public records. Well, the matter of *New York Times*
10 says the First Amendment right of access to criminal
11 proceedings is not absolute. Proceedings may be closed, and by
12 analogy, documents may be sealed if specific on-the-record
13 findings are made demonstrating that closure is essential to
14 preserve higher values and is narrowly tailored to serve that
15 purpose. When you review the affidavit, your Honor, you'll
16 find the same things that I'm confident that Judge Schroeder
17 found in sealing it in the first instance and that you should
18 not unseal it. Thank you.

19 MAGISTRATE JUDGE ROEMER: Thank you. Now, one of
20 the places to be searched was Mr. Wood's house?

21 MR. TRIPI: Yeah, it was his house slash.

22 MAGISTRATE JUDGE ROEMER: And they made the garage
23 into a clubhouse?

24 MR. TRIPI: Yes.

25 MAGISTRATE JUDGE ROEMER: Now, where are we on

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2 that? Doesn't Mr. Wood --

3 MR. TRIPI: Mr. Wood, at the time I responded,
4 hadn't even filed an affidavit. Initially I responded he has
5 no standing. I would concede his affidavit, unlike Mr.
6 Scanlon's, is sufficient, but only to those aspects. It's a
7 lengthy seven location document, so I would submit that only
8 items that relate specifically to his residence would be
9 available to Mr. Molloy, and that could be provided in a
10 redacted format. But, that is going to cut out a lot of the
11 information.

12 MAGISTRATE JUDGE ROEMER: I just want to make
13 clear, when you say to his residence, you're including the
14 clubhouse?

15 MR. TRIPI: His residence was a clubhouse for a
16 period of time.

17 MR. MOLLOY: All of the things that were seized
18 were in the house, in my client's house.

19 MAGISTRATE JUDGE ROEMER: Okay. But I just --
20 you're including the garage as part of the house?

21 MR. MOLLOY: Yes.

22 MAGISTRATE JUDGE ROEMER: My understanding is that
23 the big bar and everything was set up in the garage.

24 MR. TRIPI: Correct. So the disclosure to him
25 should be limited and then redacted appropriately, and I can do

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2 that. And if Mr. Molloy, it would be for his eyes only. If
3 Mr. Molloy has an issue with that, he can take it to the Court,
4 I would assume.

5 MR. STACHOWSKI: Judge, with respect to Mr.
6 Olejniczak, I've been thinking about the need to see those
7 documents myself because Mr. Tripi has made a point that Mr.
8 Olejniczak's hunting guns, his father's hunting guns, his son's
9 hunting guns, are really some -- has some nexus to the South
10 Buffalo clubhouse because it was a close proximity of his house
11 and they may have found guns. And maybe in that warrant, I
12 might have some information that not only assists me in the
13 suppression hearing, but also in any challenge that I might
14 have that Mr. Tripi is trying to connect him to guns in that
15 place because he happened to have hunting rifles in a safe in
16 his house.

17 MR. TRIPI: Again, that is antithetical to what
18 the Supreme Court councils that the Fourth Amendment protects
19 people not places. So he hasn't even submitted an affidavit
20 attempting to assert standing in that clubhouse. I ask the
21 Court to deny that.

22 MAGISTRATE JUDGE ROEMER: Mr. Molloy, I'm sorry,
23 you stood up like you were going to say something and I didn't
24 --

25 MR. MOLLOY: I wanted to acknowledge it was my

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2 client's residence.

3 MAGISTRATE JUDGE ROEMER: Mr. Hoover, did you want
4 to add something?

5 MR. HOOVER: I just wanted to add, Judge, the
6 jumping off point on this whole argument is these findings that
7 Magistrate Judge Schroeder found. I don't ask Mr. Tripi
8 questions, the Court does, but is there an order, is there a
9 transcript of findings, does the order contain specific
10 detailed findings as to each location searched? Does it
11 contain citations to the applicable authorities? I mean, and
12 you don't -- you obviously don't have to order Mr. Tripi to
13 answer that question. We haven't seen it. And it seems to me
14 that the idea that there is some super compelling basis, if it
15 was just the, for lack of a better term, the standard seal, the
16 search warrant is the place to start and whether the Court
17 directs that to be released to us or unsealed, this is a unique
18 and different case than all of these other instances and you
19 should order it that it be produced to the attorneys.

20 MR. TRIPI: Maybe I'm jaded because I've only done
21 these cases for nine years, so I don't see it as so unique and
22 so different, Judge.

23 MAGISTRATE JUDGE ROEMER: Okay. Next is the
24 motion to strike surplusage.

25 MR. GRABLE: Yes, your Honor. Mr. Fitzsimmons is

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2 going to take the first part of the argument and I'll take the
3 second part.

4 MAGISTRATE JUDGE ROEMER: Okay.

5 MR. FITZSIMMONS: Good morning, your Honor.

6 MAGISTRATE JUDGE ROEMER: Good morning, Mr.
7 Fitzsimmons, or afternoon now.

8 MR. FITZSIMMONS: I guess it is the afternoon.
9 Your Honor, this Court has the authority, under Second Circuit
10 case law, to strike language from the indictment that is, (1)
11 not relevant, and (2) prejudicial or inflammatory. And here,
12 your Honor, paragraphs 2 through 24 of Count 1 of the
13 introduction are simply that. They are the government's
14 prejudicial statements that form no basis for any charge in the
15 indictment. It's the government's inaccurate attempt to
16 describe what the Kingsmen are about. And it's the
17 government's attempt to inflame the jury and stain all of the
18 defendants with generic criminal allegations before the trial
19 even gets underway. And, your Honor, just to highlight a few
20 examples of how these paragraphs are not relevant and how these
21 paragraphs are prejudicial, I'm going to highlight for the
22 court a few examples.

23 Your Honor, paragraph four states that the
24 Kingsmen somehow intentionally omitted certain rules from its
25 bylaws in the event that law enforcement came into possession

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2 of them. Your Honor, this is a speculative statement of the
3 mind-set of the drafters of the Kingsmen bylaws that has no
4 relevance to the RICO conspiracy charge or any of the other
5 charges in the indictment. And, your Honor, the concern here
6 is similar to the concern in the *Malachowski* case, where in the
7 *Malachowski* case, the Court feared that the government's use of
8 the word "obliterated serial number" to identify a firearm in
9 the indictment would cause the potential for jurors to infer
10 that the defendant was seeking to avert law enforcement
11 detection. And that is exactly what is going on here. The
12 government is directly saying that. So the court in
13 *Malachowski* found that is not relevant and prejudicial. And,
14 your Honor, I would say the same thing here. Speculating as to
15 the mind-set of the drafters of the Kingsmen bylaws as to what
16 they intentionally left out is not relevant to any of the
17 charges and it's prejudicial.

18 Example No. 2, paragraph 22, "that the Kingsmen
19 members girlfriends were referred to as "old Ladies" and that
20 the "Old Ladies" were loyal followers of club rules. Your
21 Honor, referencing an alleged misogynistic nickname for club
22 members' nicknames is completely irrelevant and unnecessary to
23 any of the charges, Count 1 or any of the other counts. And
24 the only purpose to include that in the introduction is to
25 inflame the jurors, especially any female jurors that may be.

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2 And, finally, Judge, paragraphs 23 and 24 are the
3 government's attempt to conjure the negative connotation of the
4 term "one-percent club." First of all, the allegation itself
5 that the Kingsmen either attempted to become a one-percent club
6 or did or whatever is entirely false in and of itself. But,
7 more importantly, for this argument, your Honor, the term
8 "one-percent club" and the use of that term and the
9 government's recitation of the historical origin of that term
10 have zero relevance to Count 1 or any other counts. And, your
11 Honor, it's prejudicial because it's an attempt to unfairly
12 suggest to the jury that associating yourself with the Kingsmen
13 somehow makes you a criminal.

14 So, your Honor, those are just a few examples of
15 how the paragraphs that we cite are irrelevant and both
16 prejudicial.

17 Now, your Honor, the government claims in its
18 responding papers that 2 through 24 tell the background of the
19 Kingsmen or give the structure and the operations in the chain
20 of command. But, your Honor, the government does that in
21 paragraphs 25 through 30. So, paragraphs 2 through 24 are
22 irrelevant, unnecessary and it is simply the government giving
23 its prejudicial and inaccurate history lesson on the Kingsmen.
24 And just with respect to what the government, the case law that
25 the government tries to hitch its wagon to and how it's not

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2 necessarily applicable here, the government hitches its wagon
3 to *U.S. v. Scarpa*. I think in the closing argument of the
4 government's papers it says, pursuant to *Scarpa* and its
5 progeny, this is what they are really relying on. Well, in
6 that case, the defense moved to strike the term "the *Columbo*
7 organized crime family" from the indictment. And the
8 government or, excuse me, the Court came back and said, "we're
9 denying that motion because the use of that term is for
10 purposes of identifying the enterprise because the enterprise
11 in that case was the Scarpa crew." So the Court said that the
12 use of that term was for identifying the enterprise, for making
13 it clear and separating out the branch from the overall family.
14 Right. Here we don't have that, Judge. Here we don't have an
15 attempt by the government in paragraphs 2 through 24 to
16 identify the Kingsmen as some kind of separate enterprise or
17 separate entity for something. We simply have the government
18 using paragraphs 2 through 24 to stimulate the jury's
19 prejudices towards that may exist towards motorcycle clubs,
20 that is what 2 through 24 are.

21 And, finally, Judge, just in closing, with respect
22 to Thomas Scanlon, who Hodgson Russ represents, the government
23 tries to claim that and bolster some kind of a relevance
24 argument because 2 through 24 are then incorporated into other
25 counts 12, 14, 15, 17, 19, 20. Your Honor, with respect to

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2 Thomas Scanlon, he is not charged in any of those, so just to
3 point that out for the Court, which we did point out in our
4 papers.

5 MAGISTRATE JUDGE ROEMER: Okay, thank you. I'm
6 not sure what part two is. I'm not sure if you should go now.

7 MR. GRABLE: Whatever your preference.

8 MAGISTRATE JUDGE ROEMER: What is it that you're
9 going to argue about?

10 MR. GRABLE: I wanted to argue about *Scarpa* in
11 particular.

12 MAGISTRATE JUDGE ROEMER: Why don't you and then
13 Mr. Tripi can respond to the whole shebang.

14 MR. GRABLE: Thank you. First and foremost, we
15 cited to a District of New Jersey case, *Vastola*, that I would
16 submit is pretty analogous to our case. In that case, there is
17 a preamble to a RICO indictment and the district court at 670 F
18 Supp. 1256 through 1257 discusses why a motion to strike
19 surplusage needed to be granted. In that case, we think that
20 case is pretty analogous to this one. On *Scarpa*, I think it's
21 an overly narrow view of *Scarpa* to say that, that the
22 government's view, in particular, is overly narrow of it. And
23 let me tell you why I feel that way and what I mean by that.
24 *Scarpa*, which is 913 F. 2d 1013, and that is the particular
25 pinpoint cite. I know that your Honor and all counsel in this

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2 courtroom are familiar with *Scarpa*. I shepardized it last
3 night. It's been cited over 1,000 times on motions related to
4 striking surplusage. But what the case says is that the
5 allegations should remain and not be stricken as surplusage if
6 two things can be said about the allegations. No. 1, that they
7 set forth something that is admissible that will be admissible
8 at trial; and then No. 2, if, in fact, the evidence is not
9 admissible and it's prejudicial, then it should be stricken in
10 the indictment. The paragraphs we're talking about, paragraphs
11 2 through 24, I would submit to the Court, are not admissible.
12 They are not going to be admissible at trial. And I'll give
13 you a couple of examples in keeping with what Mr. Fitzsimmons
14 did without running through all of them, but I think the
15 analysis holds true for all of them. In particular, paragraph
16 12, and this is in the superseding indictment at docket item
17 No. 33, page five, paragraph 12, it says, "KMC members were
18 expected to follow orders issued by the national president,
19 regional presidents, their own chapter president and other
20 leaders within the KMC. These orders included committing acts
21 of violence to include assaulting rivals and non-compliant KMC
22 members, shootings and acts involving murder." A couple of
23 interesting points about that paragraph and all of these
24 paragraphs. They paint every defendant in this case with the
25 same brush. It doesn't distinguish one defendant from another.

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2 Now, Tim Enix, my client, is named in one overt act. He is
3 named in overt act A-7, but everyone is in that one. The only
4 one attributed specifically to him is paragraph 33. So with
5 the broad brush of these paragraphs 2 through 24, they are all
6 said to be guilty of what is described in, for example,
7 paragraph 12. Now, how in the world is the government going to
8 introduce admissible evidence at trial that Tim Enix was
9 expected to follow orders if issued to commit acts of violence,
10 to assault rivals, to commit murder, to conduct shootings? If
11 that evidence were offered by the government at trial, Jenkins
12 specifically, they put a cooperator on to testify to those
13 sentences included within paragraph 12, every defense attorney
14 in this room would stand up and object that it's not specific
15 enough, that it should be, it should relate to a particular
16 defendant, and, more importantly, that it violates Rule 704(b)
17 that says, "a witness can't take the stand and say that a
18 defendant possessed a particular intent." What that paragraph
19 does is say to the jury that every defendant in this case
20 possessed a certain mental state with respect to orders they
21 received from KMC leadership. That is not admissible. It
22 wouldn't be admissible at trial.

23 In paragraph -- I won't go into why it's
24 prejudicial, it's obvious why it's prejudicial, but it's
25 clearly not admissible. The paragraph that Mr. Fitzsimmons

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2 referenced, paragraph 22, let me read that one, if I can. It's
3 from docket item No. 33, page six, "Girlfriends and wives of
4 KMC members referred to as 'Old Ladies,' were loyal to the
5 club, followed club rules and assisted KMC members in criminal
6 and other activities." Now, the government knows that Tim
7 Enix's wife has no place in this paragraph. They have the
8 proof, they know that their proof at trial won't come close to
9 establishing that Tim Enix and his wife should be painted with
10 that brush. There is no way that is going to be admissible at
11 trial. If a cooperator takes the stand and tries to give that
12 testimony within paragraph 12, the Court will surely sustain my
13 objection to it and rule that the witness has to give more
14 specific information about a particular defendant, for example,
15 and that it's not admissible generally under 403 under all of
16 the defendants in this case. The government doesn't lose
17 anything with the loss of these paragraphs. They respond that
18 they need these paragraphs in order to provide the framework of
19 the conspiracy and set forth factual information that it
20 intends to prove at trial. It won't be able to prove it at
21 trial. And what they have in paragraphs -- in the overt acts,
22 we didn't move to strike a surplusage. It's not surplusage,
23 they'll either put that proof on at trial and prove the overt
24 acts or they won't. And we'll fight about it in front of the
25 jury when we give our summations. But the problem with these

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2 acts at paragraphs 2 through 24 of the introduction is it's not
3 going to be admissible as the government has set it forth.
4 There is no way it's going to be admissible. But Judge
5 Welford, at the beginning of the case, is going to read each of
6 the paragraphs to the jury and then she is going to give this
7 indictment to the jury to take back into the deliberation room.
8 I submit it will be lost on the jury by the time they begin
9 their deliberations that this was not admissible if our
10 objections are sustained and I believe they will be. So
11 *Scarpa*, I believe, doesn't stand for the notions that the
12 government cites it for. I think *Scarpa*, quite clearly, says
13 at page 1013, that in the first instance, the paragraphs in
14 question have to set forth evidence that will be admissible in
15 trial and if it's not going to be admissible and it's
16 prejudicial, then those paragraphs should be stricken.

17 MAGISTRATE JUDGE ROEMER: Thank you. Mr. Tripi?

18 MR. TRIPI: Thank you, your Honor. Well, I think,
19 first of all, counsel is conflating relevant with admissible.
20 The *Scarpa* case, which is the case which we'll hitch our wagon.
21 Second Circuit is never a bad place to hitch your wagon.
22 Quoting from *Scarpa*, they say, "Motions to strike surplusage
23 from the indictment will only be granted only where the
24 challenged allegations are not relevant to the crime charged
25 and are inflammatory and prejudicial." The Court went onto

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2 say, "If evidence of the allegation is admissible and relevant
3 to the charge, then regardless of how prejudicial the language
4 is, it may not be stricken." So, paragraphs 2 through 24,
5 these aren't just written out of whole cloth, these are grand
6 jury findings. They are incorporated by reference into
7 substantive counts and they are all relevant to the charged
8 RICO enterprise, the charged RICO conspiracy and the other
9 portion of it admissible, yes, they will be admissible. You
10 don't need to have every line that is written here come out of
11 one particular person's mouth. The grand jury takes the
12 information in total and makes these findings. But relevant
13 and admissible, paragraph one, "The Kingsmen was a motorcycle
14 organization comprised of individual chapters located in
15 various counties, cities and towns." And then it goes on and
16 provides the locations; relevant, admissible. Paragraph two,
17 "The KMC was started in or about 1959 in Lockport, New York,
18 has structure, rules, chain of command, governed by written
19 bylaws." And then quoting from those bylaws, actually, "KMC
20 was one club not separate clubs divided by states or cities";
21 relevant admissible. How are the bylaws for the charged
22 enterprise not coming into evidence? I'll be interested in
23 that objection.

24 Paragraph three: "Members were expected to abide
25 by the bylaws and failure to do so could result in punishment

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2 ranging in fines, assault, expulsion from the organization.
3 Expulsion from the organization being referred to as "out bad"
4 at which times other members were to cease all contact with
5 expelled members." That will be relevant and admissible,
6 especially when you consider some of the acts of violence that
7 happened later - drive-by shootings, assaults of former
8 members, threats to former members and murders.

9 KMC imposed additional rules known to members but
10 intentionally not written into the bylaws in the event law
11 enforcement came into possession of them. Is that relevant,
12 admissible? Sure it is.

13 Now, if Judge Wolford takes a different view,
14 she'll take a different view. But I don't see how that is not
15 coming in through witness testimony. One such unwritten rule
16 is that members were not to speak to law enforcement. If it
17 became known that a member talked to law enforcement, that
18 member was subject to being expelled from the club. Again,
19 unwritten rule. How are rules of the enterprise, whether
20 written or unwritten, not relevant or not admissible? This
21 explains what the enterprise is. And that is why it is
22 specifically incorporated into no less than half a dozen other
23 counts, substantive counts, of the indictment.

24 The KMC had a hierarchal range structure. I won't
25 read the whole, paragraph, but that is going to be testimonial,

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2 that is going to be in the bylaws. There is no way that that
3 is not relevant and not admissible.

4 Paragraph six further lays out the chain of
5 command, roles of the Nomads. Again, that is all information
6 that will come in at trial.

7 Paragraph eight, there was an initiation process
8 that is described there. Again, don't understand how that is
9 not relevant and not admissible. Referred to each other by
10 club names. That is going to come in. We start this
11 investigation, you don't know anyone's real name, that will
12 come into evidence. People call each other by club names.
13 They are all referenced on the face sheet of the indictment
14 everyone that has a club name. They paid monthly dues, which
15 were divided between the local chapter and national chapter.
16 There is an interstate affect on commerce requirement for RICO
17 enterprise or that commerce would be affected. How is it not
18 relevant or admissible that a multi-state organization has a
19 dues-based system that spreads wealth around to various local,
20 regional and national chapters?

21 Paragraph 11, they wore leather vests and jackets
22 with the emblem on them referred to as colors and patches.
23 That is going to be all over this case; relevant and
24 admissible. And it provides a description of what the emblem
25 is. We're not going to see photos of the KMC patches? I would

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2 highly doubt that.

3 Paragraph 12, members were expected to follow
4 orders issued by the national president, et cetera, et cetera,
5 et cetera, that lays the framework for every crime of violence
6 essentially that is followed in this indictment and
7 specifically incorporated by reference into the various VICAR
8 counts, assaults and murder. Those are 12, 14, 15, 17, 19 and
9 20. They were expected to attend mandatory parties. Well,
10 that is testimonial. That is in the bylaws, too; relevant,
11 admissible.

12 Expected to follow club rules. That is how the
13 whole enterprise operated. We might as not have a trial if the
14 government is not able to prove that. Paragraph 15, chapter
15 clubhouses were maintained and entry and exit and egress was
16 strictly controlled by the KMC. In one instance, just to give
17 you an example, we'll have testimony from a witness who got
18 beat to a pulp when she tried to leave a clubhouse. Seems to
19 me when a particular charged defendant is charged with beating
20 and raping her, that is relevant and admissible. And that will
21 be repeated through many other witnesses. The finding that KMC
22 maintained clubhouses with firearms and ammunition to defend
23 against rival motorcycle gangs, there are photos of firearms,
24 there are firearm seizures, there is testimonial evidence, all
25 to that effect. There are multiple counts of 924(c) are in

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2 this count as well. That is all over this case. It's relevant
3 and it's admissible. So, so far everything we've covered is
4 relevant and admissible and helps describe the enterprise.
5 It's exactly what *Scarpa* says you don't strike.

6 KMC chapter clubhouses maintained untaxed
7 cigarettes obtained from area Indian reservation, which were
8 routinely sold for profit. Well, as part of the enterprise,
9 which is defined later in additional paragraphs, one of the
10 racketeering predicates is sale of untaxed cigarettes, that is
11 a RICO predicate in this alleged conspiracy. So that is there,
12 relevant, admissible and it's part of how the conspiracy
13 functioned.

14 Eighteen, chapter clubhouses permitted illicit drug
15 use and distribution, including cocaine, marijuana, controlled
16 substances between club members, associates, friends and
17 supporters. There will be a myriad of witnesses that testify
18 about that. There are multiple substantive counts of
19 maintaining drug premises at each Kingsmen location. I don't
20 see how that is not relevant or admissible.

21 Paragraph 19, KMC clubhouses maintained a fully
22 stocked bar with a wide selection of beer, liquor sales of
23 which were utilized to generate income for the KMC. Again,
24 this is a commerce requirement. Functioning as a de facto bar
25 affects interstate commerce. Selling tequilas, vodkas that are

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2 distilled out of state affects interstate commerce. Just
3 another way that we'll be proving that this multi-state
4 enterprise affected commerce; relevant and admissible. And not
5 very prejudicial, either, I might add.

6 Paragraph 20, "KMC clubhouses maintained gambling
7 devices and machines." Well, we seized them from clubhouses.
8 It's part of the racketeering as well as they allowed illegal
9 gambling in violation of law.

10 Paragraph 22, "Girlfriends and wives referred to
11 as 'Old Ladies' were loyal to the club, followed club rules and
12 assisted members in criminal and other activities. The members
13 gave patches to their ladies signifying them as 'Old Ladies.'"
14 There will be photos of those things. There will be references
15 to people referring to so and so's old lady all throughout the
16 testimony. The old ladies are specifically referenced and
17 their role is defined in the KMC bylaws, essentially, and I'm
18 paraphrasing, says you better control your old lady, you're
19 responsible for her. You don't get multiple old ladies. You
20 got to clear getting the patches to the old ladies. And we've
21 recovered old lady patches, for example, in Melinda Enix's
22 house. Again, that is relevant, admissible evidence. This is
23 not -- there are times when member's phones are in female
24 names, things of that nature, that is going to be all over this
25 case. It's relevant and it will be admissible.

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2 The references in paragraph 23 and 24, the one
3 percenter reference, that will be referred to in this case as
4 well. It's a finding by the grand jury, especially when you
5 look at paragraph 24, excuse me, 23: In 2013, certain KMC
6 members sought to establish the KMC as a one-percent club.
7 Well, when you look at the acts of violence committed in this
8 indictment, sure, there are some pre 2013, but I think a fair
9 reading of this indictment is there was a lot more after 2013.
10 Is that relevant? Is that helpful? Does that provide context?
11 It certainly is going to be testimonial evidence presented at
12 the trial. So I don't see how they get around *Scarpa*. I
13 respectfully disagree. These are all good lawyers, you know.
14 But if we have a debate at trial about a particular portion of
15 evidence and its admissibility, there will be more than enough
16 other items of evidence establishing each of these paragraphs
17 that will come into evidence. For example, a Facebook message
18 by Timothy Enix. He says "follow chain of command at all
19 times." That is his client. He maintained the Facebook
20 messaging to the private account. So using that, it's not
21 hearsay, it's from his client, it's relevant and it's directed
22 to the entire club. I don't see how Judge Wolford is not going
23 to allow that. So, we totally disagree with striking the
24 surplusage as claimed in paragraphs 2 through 24, which are all
25 incorporated and would affect the grand jury findings in a

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2 multitude of ways, not only stripping the introduction, but
3 would affect the findings that are substantive, counts 12, 14,
4 15, 17, 19 and 20. Thank you.

5 MAGISTRATE JUDGE ROEMER: Thank you.

6 MR. GRABLE: Nothing is lost from those counts.
7 The government -- and we set forth this information in our
8 reply papers. Those substantive counts incorporate Count 1 all
9 together. The problem with the overt acts and what I didn't
10 hear, what I didn't hear Mr. Tripi say is, for example,
11 paragraph 12, that the paragraph that he said, "et cetera, et
12 cetera, et cetera" when he got to the part about every single
13 Kingsmen member being expected to follow orders to commit acts
14 of violence, including assault, shootings and murder, that was
15 the et cetera, et cetera, et cetera part. I didn't hear how
16 under Rule 704(b) that is going to be admissible against every
17 single defendant in this case. It's not going to be. What I
18 did hear Mr. Tripi do is run through each of the overt acts and
19 provide, in certain circumstances, proof that he intends to
20 introduce against individual defendants related to these
21 paragraphs within Count 1. There is nothing says that if you
22 grant the motion to strike as surplusage as it's not admissible
23 as to against everybody that he can't introduce it as against
24 particular defendants. Your striking surplusage under Rule
25 7(d) doesn't render the evidence inadmissible against

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2 individual defendants. But what we have is much more analogous
3 to the *Vastola* situation. I didn't hear anything about *Vastola*
4 in the government's argument. It's not in their papers,
5 either. And in *Vastola*, the Court says that a preamble to a
6 RICO indictment should not contain additional information to
7 what is alleged in the counts nor should it contain terminology
8 that carries with it connotations of culpable behavior if under
9 *Scarpa* it's not going to be admissible as against everybody.

10 And I'm not conflating relevance and
11 admissibility. *Scarpa* says if the evidence of the allegation
12 is admissible and relevant, then you move to the prejudice
13 analysis. And I won't belabor the prejudice point, but it
14 clearly has to be admissible. So what you see in all of these
15 district court cases that have implemented *Scarpa* is the
16 government does what it has done here, either in their papers
17 or orally, they make a proffer. And almost every one of the
18 *Scarpa* cases, the proffer establishes that the evidence is
19 going to be admissible. The evidence set forth within a
20 particular objectionable paragraph is going to be admissible.
21 I would submit that what we gave you, Judge, at page 28 at our
22 initial Memorandum of Law where we talk about the problem with
23 very specific paragraphs, those paragraphs are all going to be
24 inappropriate and should be stricken as surplusage because the
25 government is not going to be able to put on any proof that

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2 would establish that those paragraphs can be asserted generally
3 against every one of the defendants in this case. And they
4 lose nothing if those paragraphs are stricken other than Judge
5 Wolford reading the government's allegations to the jury.

6 MAGISTRATE JUDGE ROEMER: Thank you, Mr. Grable.

7 MR. TRIPI: May I briefly respond?

8 MAGISTRATE JUDGE ROEMER: Briefly.

9 MR. TRIPI: I will. The standard is not "they
10 lose nothing." The standard is as set forth in *Scarpa*. And,
11 Judge, Mr. Grable is trying to say everything has to be a
12 specific defendant has to have committed a specific act in a
13 specific way. We're not talking about the overt acts, we're
14 talking about the introductory 24 paragraphs. Like it or not,
15 they are in a RICO conspiracy where they agreed, the enterprise
16 constituted an ongoing organization whose members functioned as
17 a continuing unit for the common purpose of achieving the
18 objectives of the enterprise. The objectives of the enterprise
19 are all laid out and consistent with those introductory
20 paragraphs, so, yeah, if you had an order to do something
21 violent, the testimony and the evidence will show you better do
22 it. So that's it.

23 MR. FITZSIMMONS: May I add one thing?

24 MAGISTRATE JUDGE ROEMER: Quickly.

25 MR. FITZSIMMONS: Your Honor, what I think the

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2 case cited by counsel for Mr. Enix, the *Wilson* case, your Honor
3 is instructive. Mr. Tripi ran through all of the paragraphs
4 and was simply saying it's admissible, it's going to come in so
5 you shouldn't strike it. But in *Wilson*, your Honor, I think it
6 was instructive. There the Court looked at it and didn't
7 really answer the admissibility question straight on, but said
8 allegations in the indictment to this defendant transported 20
9 tons of C4 was irrelevant and unnecessary how many tons. So
10 it's also kind of goes to the level of detail in these
11 paragraphs becomes -- is it what makes it more prejudicial and
12 inflammatory, so I just wanted to highlight that for your
13 Honor.

14 MR. TRIPI: I'm not aware. I'm sure counsel will
15 correct me if I'm wrong, but I'm not aware of one district
16 court judge in this district interpreting *Scarpa* that struck
17 the type of surplusage that they are seeking. Here I certainly
18 didn't see it any of their papers.

19 MAGISTRATE JUDGE ROEMER: Okay. Request for grand
20 jury transcripts and evidence. Mr. Okay, you requested that
21 all grand jury transcripts, all evidence and testimony
22 considered by the grand jury be provided to you.

23 MR. OKAY: Yes. That would come under Rule 3500
24 when that is turned over to us.

25 MAGISTRATE JUDGE ROEMER: So you were just asking

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2 for 3500 material?

3 MR. OKAY: Essentially, yes.

4 MAGISTRATE JUDGE ROEMER: Okay.

5 MR. TRIPI: I'll rely on my papers, Judge.

6 MAGISTRATE JUDGE ROEMER: Plea agreements,
7 pretrial service reports and presentence reports.

8 MR. GRABLE: Your Honor, it's my understanding
9 that the government's position is not inconsistent with ours,
10 and by that I mean they intend to provide the cooperation
11 agreements, plea agreements, et cetera, within the 3500
12 material. And I read the government's response to our motion
13 for an in camera inspection of the presentence reports to be
14 that the government agrees that that is the appropriate Second
15 Circuit standard, so we would ask that this Court issue an
16 order directing that the presentence reports be provided to
17 Judge Wolford sometime prior to the commencement of the trial.

18 MR. TRIPI: The only -- I don't think it's a
19 disagreement, but that would be to Judge Wolford at that time
20 as she directs. I don't think you need to order a timeline for
21 them to give it to Judge Wolford. But you may have a different
22 view, Judge.

23 MAGISTRATE JUDGE ROEMER: Well, I suppose I could
24 order Judge Wolford to do all kinds of things. I'd rather
25 doubt she'll do that.

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2 MR. TRIPI: I defer that to Judge Wolford to do it
3 on her timeline is I guess what I'm saying.

4 MAGISTRATE JUDGE ROEMER: I think that is all I
5 have. Anybody have anything they want to add to the argument
6 today?

7 MR. TRIPI: Not from the government.

8 MR. HOOVER: Judge, I'll stay here, it's short.
9 On the point that Mr. Grable just raised, all of that is
10 accurate and fine. There is a judicial document issue there,
11 though. I mean, those plea agreements are ones that were
12 presented to the court, Judge Wolford. And Judge Wolford, at
13 least tentatively, accepted or went through a proceeding by
14 which all of those people pleaded guilty, so maybe the Court
15 wants us to take it up with her or the motion to be heard with
16 her and that is okay, too. But the idea, again, of this
17 wholesale sealing of documents for these pleas is not one that
18 is consistent with the cases that we discussed in a different
19 context. But in addition to being *Brady* and *Giglio* --

20 MAGISTRATE JUDGE ROEMER: I guess I'm having
21 trouble following you. The plea agreements will be under seal?

22 MR. HOOVER: I think the reason I made the motion
23 I think that was joined or Mr. Grable did as well, is the plea
24 agreements of defendants in this captioned case have, for some
25 reason, been sealed, instead of publically filed. And I don't

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2 understand why that was. And so what we're saying is whether
3 the government provides them or the Court unseals them or
4 directs that they be provided pursuant to a protective order,
5 that is the crux of the issue.

6 MAGISTRATE JUDGE ROEMER: Well, the plea
7 agreements, they are going to be provided?

8 MR. TRIPI: Yes, Judge. Judge, what I can say is
9 this. I think there is, quite frankly, a different procedure.
10 I'm sorry, I think there is a different procedure in Rochester
11 in terms of the way pleas are docketed. All of the pleas were
12 entered in a public courtroom, the transcripts of the pleas are
13 available. When Judge Wolford accepts a plea agreement or
14 provisionally accepts a plea agreement where there may be
15 cooperation provisions, she returns the document to the
16 government for filing upon sentencing. So I think I need to
17 just get some clarification from Judge Wolford.

18 MAGISTRATE JUDGE ROEMER: But, in any event,
19 you're going to provide counsel with a copy?

20 MR. TRIPI: Yes, they will have those. I just
21 need to get some guidance in terms of that.

22 MAGISTRATE JUDGE ROEMER: Okay.

23 MR. TRIPI: It was a Court procedure, it wasn't a
24 government-induced procedure.

25 MAGISTRATE JUDGE ROEMER: Okay.

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2 MR. HOOVER: Nothing additional, Judge.

3 MAGISTRATE JUDGE ROEMER: Okay. Anybody anything?

4 Okay. Again, happy St. Patrick's day. Take care.

5

6 CERTIFICATE OF TRANSCRIBER

7

8 I certify that the foregoing is a correct transcript from
9 the official electronic sound recording of the proceedings in
10 the above-entitled matter.

11

12 /s Karen J. Bush, RPR

13 Official Court Reporter

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